SUPREME COURT, U. S.

DEC 9 1968

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 819

MAGNESIUM CASTING CO.,

PETITIONER,

v.

ALBERT J. HOBAN, REGIONAL DIRECTOR OF THE FIRST REGION OF THE NATIONAL LABOR RELATIONS BOARD; and his officers and agents and the NATIONAL LABOR RELATIONS BOARD AND ITS MEMBERS FRANK W. McCULLOCH, JOHN H. FANNING, GERALD A. BROWN, HOWARD JENKINS, JR., AND SAM ZAGORIA who collectively exercise the powers of the Board, and their officers and agents,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Magnesium Casting Co. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinion Below

The Opinion of the Circuit Court is reported at . . . F. 2d. . . . A copy of this opinion is appended hereto. Appendix A infra.

Jurisdiction

The judgment was entered on September 10, 1968. The jurisdiction of the Court is invoked under 28 U. S. C. A. Sec. 1254.

Questions Presented

I. Can a United States District Court enjoin defendants Regional Director and the National Labor Relations Board from certifying the results of an election where a United States Court of Appeals has held that a rule affecting the conduct of that election complied with by petitioner was illegally promulgated?

II. Did the petitioner waive its right to object to the legality of a rule that an employer furnish the National Labor Relations Board with the names and addresses of employees eligible to vote in a representation election so it can be furnished to all parties in that election (called the *Excelsior* rule) when it complied with the rule and, immediately following a decision of the United States Court of Appeals for the First Circuit finding the rule was illegally promulgated and before the election, moved that the Board cancel the election and take appropriate action to negate the effects of compliance with its illegally promulgated rule?

III. Where the defendants Regional Director and National Labor Relations Board failed to assert that petitioner had waived its right to object to the *Excelsior* rule when such defendants replied to petitioner's Motion to Withdraw De-

cision and Direction of Election and Dismiss Petition, or in their ruling on petitioner's appeal from denial of that Motion filed prior to the election, or in the proceedings involving petitioner's Motion for temporary restraining order, granted by the United States District Court for the District of Massachusetts in *Magnesium Casting Co.* v. *Albert J. Hoban, et al*, Civil Action No. 68-625-C, (Appendix B infra) were defendants thereafter estopped from asserting that claim at the Court of Appeals?

Statement of the Case

The petitioner is engaged in Boston, Massachusetts, in the manufacture and supply of various desk accessories, die castings, and other products in interstate commerce. Defendants are the Regional Director of the First Region of the National Labor Relations Board, Albert J. Hoban, his officers and agents, and the members of the Board, and their officers and agents.

On March 14, 1968, the United Steelworkers of America, AFL-CIO (hereinafter called "the Steelworkers") filed a representation petition for an election among petitioner's production and maintenance employees. On May 22, 1968, following a four day hearing on the representation petition, defendant Hoban issued a Decision and Direction of Election (Appendix C infra) which, in addition to determining the eligibility of particular employees and directing an election be held, required petitioner, pursuant to a Board "rule" first promulgated in *Excelsior Underwear, Inc.*, 156 NLRB 1236, to file with defendant Hoban within seven days an election eligibility list containing the names and addresses of all its production and maintenance employees who were eligible to vote in the representation election, which was subsequently scheduled for June 21, 1968. Said list was to be made available to the Steelworkers. Defen-

dant Hoban stated in his Decision and Direction of Election that "failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed." In accordance with the *Excelsior* rule and under threat of having the election set aside, and with the knowledge that the rule had been upheld by the United States District Court for the District of Massachusetts in *National Labor Relations Board* v. *Wyman-Gordon Company*, 270 F. Supp. 280, the petitioner supplied the list to defendant Hoban, who gave it to the Steelworkers.

On June 12, 1968, the United States Court of Appeals for the First Circuit, in *Wyman-Gordon Company et al* v. *National Labor Relations Board*, 397 F. 2d 394 (1968) found the *Excelsior* rule to be invalid because it was promulgated in disregard of the notice and publication requirements of the Administrative Procedures Act, 5 U. S. C. A. §§ 552 and 553.

On June 17, 1968, petitioner filed with defendant Hoban a Motion to Withdraw the Decision and Direction of Election and Dismiss Petition (Appendix D infra) on the grounds set forth in the Circuit Court's *Wyman-Gordon* decision. Two days later, defendant Hoban, by telegraphic message, denied petitioner's Motion on the basis that he interpreted the *Wyman-Gordon* decision not to have "retroactive application" (Appendix E infra). Immediately following receipt of defendant Hoban's denial of its motion, petitioner by telegraphic message filed with defendant Board a request for special permission to appeal defendant Hoban's denial (Appendix F infra). The following day defendant Board telegraphed the petitioner denying its appeal "as lacking in merit" (Appendix G infra). On June 21, 1968 the election was conducted and the Steelworkers received a majority of the votes cast.

On June 28, 1968, petitioner filed with defendant Hoban Objections to Conduct Affecting the Results of the Election,

alleging as grounds for setting aside the election, among other reasons, the same reasons set forth in its Motion to Withdraw the Decision and Direction of Election and Dismiss Petition (Appendix D infra).

On July 12, 1968, petitioner filed a Complaint in the United States District Court for the District of Massachusetts, Civil Action No. 68-625-C, seeking to restrain defendant Hoban and defendant Board from certifying the results of the election and to have the Court require defendant Hoban to withdraw his Decision and Direction of Election, cease implementing the *Excelsior* rule and dismiss the representation petition.

During oral argument the defendants at no time raised the defense that petitioner had waived its right to object to the *Excelsior* rule by submitting the list as required in the Decision and Direction of Election. In fact, at no time in any of the proceedings prior to the Court of Appeals did the defendants raise the "waiver" argument (see Certified Stenographic Transcript of Hearing Before Caffrey, D. J.).

On July 16, 1968, District Court Judge Caffrey issued his Opinion and Order enjoining and restraining the defendants from certifying the results of the election held on June 21, 1968 pending the outcome of an application for a writ of certiorari to the Court of Appeals for the First Circuit to be filed by the National Labor Relations Board in the case of *Wyman-Gordon* and pending further Order of the District Court which retained jurisdiction in the premises.

Upon an appeal from the District Court by the defendant Board the United States Court of Appeals for the First Circuit on September 10, 1968 vacated the interlocutory order of the District Court and instructed that Court to dismiss the Complaint, which said District Court did on October 2, 1968. The Court of Appeals stated that peti-

tioner waived its right to test the *Excelsior* rule by not refusing to comply with the rule and allowing the election to proceed in an "orderly fashion."

Reasons for Granting the Writ

I. In *Leedom* v. *Kyne*, 1958, 358 U. S. 184, this Court in considering whether the District Court had jurisdiction to entertain a suit to enjoin "unlawful action of the Board (which) has inflicted an injury on the (respondent)," asserted the District Court did have jurisdiction:

> This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act.

Again, in *Texas & New Orleans R. Co.* v. *Railway Clerks*, 1929, 281 U. S. 548, at 568, 569, this Court maintained:

> While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded. . . If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose. The definite prohibition which Congress inserted in the Act cannot therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated.

While the Labor Management Relations Act of 1947 and the Labor Management Reporting and Disclosure Act of 1959 (29 U. S. C. 141 et seq.) provides in Section 9 and 10 for "review" of final orders of the Board, we are not here concerned with a question of review. The question here is not whether the Board made an erroneous assessment of the particular facts before it leading to a conclusion not comporting with the law. See *Boire* v. *Greyhound Corporation*, 1964, 376 U. S. 473. "Review" implies that the Board's action was taken within its jurisdiction, which is *not* the case herein, and no "erroneous assessment" of facts is alleged herein. What is asked to be enjoined is a plain violation of a clear and mandatory provision of the Labor Management Relations Act, as found by the Court of Appeals in the *Wyman-Gordon* case, supra, which is presently before this Court on a writ of certiorari from the decision of the First Circuit.

The Circuit Court's determination in the case at bar that the *Excelsior* rule was not jurisdictional so far as the election was concerned is in conflict with its own decision in *Wyman-Gordon*, supra at 397-398, when it stated:

> We can only conclude that Excelsior's purpose is what it appears to be on its face, a provision requiring the employer to furnish interested parties with affirmative assistance in conducting their election campaigns. Such assistance is substance, not Board procedure.

At no time in *Wyman-Gordon* did the Court decide the merits of the *Excelsior* rule, except to say it rendered "assistance" to the interested parties. Had the Board followed the requirements of the Administrative Procedure Act it may have found that the *Excelsior* rule disturbed the "laboratory conditions" the Board seeks to effect in representation elections. Perhaps it would have balanced the "equi-

ties" by prohibiting unions, as it does employers, from personally visiting employees' homes prior to an election. The "assistance" granted to the union in this case may, in fact, have given a distinct advantage to the union. However, the basic question here pertains to what may have resulted had the notice and publication requirements of the Administrative Procedure Act been complied with. Unless and until such procedure is followed, it must be assumed that implementation of the *Excelsior* rule made the election unlawful.

Since matter contained in this issue is closely related to the issues raised in the *Wyman-Gordon* case, petitioner urges that this Court grant its petition and hear this matter together with the *Wyman-Gordon* case.

II. The Circuit Court's determination that petitioner waived its right to protest the legality of the *Excelsior* rule presents to this Court an important question of law and jurisprudence which should be settled by this Court — namely, must one violate or refuse to comply with a law, rule, or regulation in order to test its legality? In this decade of discontent in which we find an increasing amount of resistance to existing legal regulations, it is important that this Court delineate and define the means available to test these laws, rules and regulations, short of exposing oneself to penalties, financial or otherwise, and/or imprisonment, for failing to obey or comply with existing regulations or laws. In the case at bar, the petitioner first had the choice of complying with the *Excelsior* rule or refusing to comply and thus engaging in perhaps long, expensive and tedious efforts to test the rule, with the possibility of being found guilty of contempt for failing to comply. The United States District Court for the District of Massachusetts, having enforced a subpoena for the *Excelsior* list, the petitioner chose to comply. But when the

First Circuit Court's decision was issued in *Wyman-Gordon*, finding the rule to have been illegally promulgated, petitioner asserted its rights and sought to protect itself against the ill effects of its compliance with rules "improperly promulgated," but the Circuit Court states, in effect, "because of your failure to test the rule you must now suffer its consequences, even though it was illegally promulgated." The issue may be analogous to the situation following *Escobedo* v. *Illinois*, 1964, 378 U. S. 478, where a number of people convicted of crimes never raised the issues raised by Escobedo, yet have been given new trials based on the ruling in the *Escobedo* case. Is not the petitioner entitled to relief so that it may be placed in a position where its rights are not being illegally deprived?[1]

III. While holding that petitioner waived its right to object to the *Excelsior* rule, the First Circuit Court did not allude to the fact that both defendant Hoban and defendant Board failed to assert such a waiver in their respective replies to petitioner's Motion to Withdraw Decision and Direction of Election and Dismiss Petition and to the appeal from the Motion's denial, and in their defense to the Motion for temporary restraining order in the District Court. While holding that the petitioner waived its right to object to the *Excelsior* rule by complying with it, the Circuit Court fails to apply the doctrine of waiver to the Board. This dual standard of the applicability of the waiver principle to the parties in the case at bar is inherently unfair. It is respectfully requested that this Court decide the applicability of the principle of waiver to parties in administrative proceedings and to parties who allege new defenses for the first time at the Circuit Court level.

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[1] The Circuit Court's concern over how to "unscramble the egg" is misplaced. Petitioner should not be denied relief because the Board improperly and illegally "scrambled the egg."

Conclusion

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Of Counsel:
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LOUIS CHANDLER
JEROME H. SOMERS

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 7184.

MAGNESIUM CASTING CO.,

PLAINTIFF, APPELLEE,

v.

ALBERT J. HOBAN, REGIONAL DIRECTOR OF THE FIRST REGION OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Arnold Ordman, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, and *Gary Green* and *Abigail Cooley Baskir*, Attorneys, on memorandum of appellants in support of their motion for summary reversal.

Louis Chandler, *Jerome H. Somers* and *Stoneman and Chandler* on memorandum of appellee in opposition thereto.

September 10, 1968

ALDRICH, *Chief Judge*. This is a motion by the National Labor Relations Board and others, defendants appellants, for summary reversal for "manifest error." First Circuit Rule 5, July 1, 1968. The facts which afford the basis of our decision[1] may be briefly stated.

[1] We do not pass upon all of the issues raised by the Board, and we do not consider certain additional facts sought to be alleged by the involved union, would-be intervenor. The petition to intervene is mooted.

In March 1968, a union[2] filed a petition for election among certain employees of Magnesium Casting Co., plaintiff appellee herein. The customary formal hearing was conducted in April, and on May 22 the Regional Director ordered that an election be held on June 21. The plaintiff was directed to furnish a list of names and addresses of all eligible employees within seven days, pursuant to the so-called *Excelsior* rule. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236. Plaintiff furnished such a list on May 29.

On June 12, 1968, this court decided in *Wyman Gordon Co.* v. *NLRB*, F.2d , that the *Excelsior* rule had been promulgated in violation of the Administrative Procedure Act, and held that noncompliance therewith could not form the basis of a subpoena or order against the employer. Relying on this decision the present plaintiff, on June 17 and thereafter, requested the Board to set aside its May 22 decision and order. The Board refused. The election was conducted as scheduled, and the union won. In the district court the plaintiff then sought a mandatory injunction setting aside the election as void. The defendants moved to dismiss, *inter alia* attacking the jurisdiction of the court, asserting that the case was not one of voidability within *Leedom* v. *Kyne*, 1958, 358 U.S. 184. The court did not pass on this motion, but entered an interlocutory injunction against the defendants, enjoining them from certifying the results of the election pending the outcome of certiorari proceedings in *Wyman Gordon*. Defendants appealed, and now bring the present motion.

We reverse. The court has substantially misconstrued the effect of *Wyman Gordon*. Plaintiff's recourse, if the *Excelsior* rule was invalid, was to refuse to comply and to allow the election to proceed in an otherwise orderly fashion if the Board and the union were so minded. Plain-

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[2] United Steelworkers of America, AFL-CIO.

tiff could not use its own compliance, afterwards regretted, as a basis for stopping all proceedings.[3] This is a clear case of waiver.

There is no merit in the contention that the election was unlawful. The fact that the Board improperly ordered the plaintiff to supply certain factual information was not jurisdictional so far as the election itself was concerned, but merely collateral thereto. A matter far more jurisdictional was held to be waived in *United States* v. *L. A. Tucker Truck Lines, Inc.*, 1952, 344 U.S. 33, because not promptly asserted. It is true that plaintiff did not wait as long in the case at bar as did Tucker, but the principle is the same. Plaintiff should have separated and resisted the illegal portion of the May 22 order rather than have complied therewith and then claimed that compliance tainted the rest.

Equally there is no merit in the claim made in plaintiff's brief in this court that the Board misrepresented its powers. There was no misrepresentation of fact in *Excelsior*. The facts were correctly set forth in the opinion. All that was involved was a question of law. That is no more a basis of misrepresentation than is the Board's claimed "threat" to take legal recourse actionable coercion. See *Commercial Credit Corp.* v. *Sorgel*, 5 Cir., 1960, 274 F.2d 449, 453, *cert. denied* 364 U.S. 834; *O'Toole* v. *Scafati*, 1 Cir., 1967, 386 F.2d 168, 170, *cert. denied* 390 U.S. 985.

Labor matters should proceed promptly. Plaintiff was no different from the employer in *Wyman Gordon*. Not being as alert to its rights, it missed the boat, or more exactly, boarded a boat it need not have. That is the end of it.

Plaintiff's motion for oral argument is denied. We have reviewed its brief, and consider the issue so plain that we

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[3] We do not pause to consider how, if plaintiff's position were to be upheld, the egg could be unscrambled.

would not be helped by oral argument. Due process does not require oral argument in every case, as is made apparent by the Supreme Court's summary reversal procedure on petition for certiorari.

The interlocutory order of the district court is vacated and that court is instructed to dismiss the complaint.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 68-625-C

MAGNESIUM CASTING CO.,
PLAINTIFF,
v.
ALBERT J. HOBAN, REGIONAL DIRECTOR OF THE FIRST REGION OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.,
DEFENDANTS.

OPINION
July 16, 1968

CAFFREY, D. J.

This matter came before the Court on plaintiff's motion for a temporary restraining order and on defendants' motion to dismiss. After hearing, I find and rule as follows:

Plaintiff is a corporation organized under the laws of the Commonwealth of Massachusetts, engaged in the manufacture and supply of desk accessories, die castings and other products which are shipped in interstate commerce. Defendants are the Regional Director of the First Region of the National Labor Relations Board, Albert J. Hoban, his officers and agents, and the members of the Board. Jurisdiction of this court is alleged in the complaint to exist on the basis of the provisions of 28 U.S.C.A. 1337 and under the legal principles contained in the opinion of the Supreme Court in *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

On March 14, 1968, the United Steelworkers of America,

AFL-CIO (Steelworkers) filed a petition with defendant Hoban for an election among plaintiff's production and maintenance employees. Hearings were held on the petition in April, and on May 22, 1968 the defendant Hoban issued a Decision and Direction of Election which, *inter alia*, required plaintiff to file with defendants an election eligibility list containing the names and addresses of all its production and maintenance employees eligible to vote in the upcoming election. This directive was based on the so-called "*Excelsior*" rule, first promulgated by the Board in its decision in *Excelsior Underwear, Inc.*, 156 NLRB 1236.

On June 12, 1968, in *Wyman-Gordon Company, et al* v. *National Labor Relations Board*, F.2d , the Court of Appeals for this Circuit held the *Excelsior* rule invalid because it was promulgated in disregard of the notice and publication requirements of the Administrative Procedure Act, 5 U.S.C.A. 552 and 553. On June 17, 1968, plaintiff filed with defendant Hoban a motion to withdraw the Decision and Direction of Election on the grounds set forth in the *Wyman-Gordon* opinion. This motion was denied by Hoban on June 19, and an attempt to appeal therefrom was denied by the Board on June 20.

On June 21, 1968, an election was conducted under the supervision of agents of defendant. The Steelworkers prevailed by a majority of 140 to 59 and on June 28 plaintiff filed with defendant Hoban objections to conduct affecting the results of the election.

The instant case was filed and heard by this Court on July 12, 1968. Counsel for plaintiff argued that plaintiff will suffer irreparable harm unless a mandatory order setting aside the election is entered by the Court. Plaintiff says that it is not seeking herein a review of a decision within the Board's authority but, rather, seeks to enjoin a plain violation of a clear provision of law, within the

ruling of *Leedom* v. *Kyne, supra,* and plaintiff says that the irreparable harm involved herein is a denial of its right to deal directly with its own employees unless and until a Union is certified as representative of the employees after a legal and proper election conducted under the supervision of the Board. Counsel for defendants advised the Court, at the oral argument, that a decision has been made to seek a writ of certiorari in the *Wyman-Gordon* case and that the Court of Appeals has stayed the issuance of its mandate pending the outcome of the application for the writ.

In *Leedom* v. *Kyne, supra,* the Supreme Court left no doubt that a district court does have jurisdiction to "strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." (p. 188) The Court also observed, "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." (p. 190) *Wyman-Gordon* is a decision which, in substance, determines that in adopting the *Excelsior* rule the Board acted in excess of the powers delegated to any administrative agency by failing to comply with the provisions of the Administrative Procedure Act regarding notice and publication of the rule proposed for adoption, and thus exceeded the restraints on its powers to adopt rules placed on all agencies by 5 U.S.C.A. 553. Having in mind that in *Leedom* v. *Kyne, supra,* the Supreme Court ruled that setting aside the Board's determination, election and certification, is within the powers of a district court, without any discussion of irreparable harm, it follows that a district court has the lesser power to stay, rather than to set aside, an election and certification conducted in clear violation of the law as determined by the Court of Appeals, pending a determination by the Supreme Court of the validity of the de-

cision of the Court of Appeals which established the illegality said to be involved in the adoption by the Board of its *Excelsior* rule.

The case of *Boire* v. *Greyhound Corporation*, 376 U.S. 473 (1964), relied upon by the Board, is inapposite, since that case was concerned with "an erroneous assessment of the particular facts before the Board." (p. 481) There is no factual issue claimed to exist herein by any party to this litigation. Consequently, an injunction will issue staying any further action in this case by all respondents pending the ultimate determination of the petition for certiorari in the *Wyman-Gordon* case.

Order accordingly. (s) ANDREW A. CAFFREY
U. S. District Judge

ORDER
July 16, 1968

After hearing, and in accordance with Opinion filed this date, it is

ORDERED that the defendants and each of them, their agents, servants, employees, and attorneys, be, and they hereby are, enjoined and restrained from certifying the results of an election held on June 21, 1968 among the production and maintenance employees of Magnesium Casting Co., Boston, Massachusetts, pending the outcome of an application for a writ of certiorari to the Court of Appeals for the First Circuit to be filed by the National Labor Relations Board in the case of *Wyman-Gordon Company, et al* v. *National Labor Relations Board,* and pending further Order of this Court which retains jurisdiction in the premises.

By the Court,
(s) HOPE K. CONNELL
Deputy Clerk
(s) ANDREW A. CAFFREY
U. S. District Judge

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

Case No. 1 RC 9973
In the Matter of

MAGNESIUM CASTING CO.,
EMPLOYER,
and
UNITED STEELWORKERS OF AMERICA, AFL-CIO,
PETITIONER.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Francis V. Paone, a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[1]

The Employer made a special appearance at the hearing, contesting the fact that a hearing was scheduled while a charge in Case No. 1-CB-1362 filed by it alleging a violation of Section 8(b) (1) (A) by the Petitioner was pending and no request to proceed was filed. The Employer premises its argument on Section 11730 of the Board's Field Manual. Said Section deals with concurrent "R" and "C" cases and states that the Board has a general policy of not proceeding in any representation case during the pendency of an unfair labor practice charge affecting some or all of the employees involved in the concurrent petition

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[1] After the close of the hearing, the Employer filed a motion to correct the record. Said motion is granted.

and where the charging party is also a party to the representation case. The undersigned, prior to the opening of the hearing, denied the Employer's request for a postponement and thereafter the Board upheld this action as a proper exercise of discretion. See *Columbia Pictures Corporation,* 81 NLRB 1313, 1314-15. *St. Louis Cordage Mills,* 170 NLRB No. 7, 67 LRRM 1378, 1379-80.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

In Case No. 1-CB 1362, the Employer charged, in substance, that the Petitioner through certain supervisors restrained and coerced employees by soliciting them to sign union cards and by distributing union campaign literature among employees. Investigation of these charges disclosed that the alleged supervisors were Obediah Ford and Ivory Scott, two of the individuals whose status is decided in the instant matter. The undersigned dismissed the charges in Case No. 1-CB 1362 on May 8, 1968, on the grounds that the investigation had disclosed that Obediah Ford was not a supervisor and that, assuming without deciding that Ivory Scott was a supervisor, he was not acting as an agent of the Union. On May 21, 1968, the Employer, Charging Party in 1-CB-1362, took an appeal from said dismissal,

which appeal is still pending. On April 2, 1968, the Employer requested a continuance of the instant matter pending the investigation of Case No. 1-CB 1362. As indicated above, this request was denied on May 3, 1968, by telegram and the undersigned's action was thereafter affirmed by the Board. In its letter requesting a continuance and at the hearing, the Employer, *inter alia,* contended that the evidence of interest submitted by the Petitioner in the instant case was tainted because of the activity alleged in Case No. 1-CB-1362 and that, therefore, the petition should be dismissed. The showing of interest is a matter for administrative determination and, of course, not litigable. *O. D. Jennings & Company,* 68 NLRB 516. Based upon a concurrent investigation of the charge in Case No. 1-CB-1362 and of the allegation that the showing of interest was tainted, the undersigned is administratively satisfied that the Petitioner's showing of interest was adequate and not tainted as urged by the Employer.

4. The Employer is engaged in the manufacture, sale and distribution of various desk accessories and related products at its Hyde Park, Massachusetts, plant, where it employs approximately 250 employees in the unit found appropriate herein. The unit description is in accord with the agreement of the parties except that the Petitioner would include seven individuals classified as assistant foremen, the employees of the records keeping department, the employees of the shipping and receiving department and the truck driver. The Employer would exclude the seven assistant foremen as supervisors and at the hearing took no position with respect to the employees of the records keeping department, the shipping and receiving department and the truck driver. In its brief, the Employer agreed to the inclusion in the unit of these categories of employees and they are so included.

William Adams, Obediah Ford and *Norman Sawyer,*

classified as assistant foremen, work in the die casting department under the supervision of the general foreman, Malcolm Emack. In addition, there are three shift foremen. The record demonstrates that these three employees are hourly paid, punch a time clock and spend the entire portion of their work day operating die casting machines. This work is no different from that of other employees engaged in the operation of similar machines. With the sole exception of receiving ten cents per hour more than other employees in their department, the aforesaid employees receive the same benefits and have similar working conditions as other die casting machine operators. They do not possess any authority to hire, fire, suspend, promote, transfer or discipline employees, nor do they responsibly direct any other employee or otherwise engage in any conduct which would affect the employment status of any other employee in their department. The record does not contain any evidence demonstrating that these individuals possess any of the indicia of a supervisor. It appears that the Employer has abandoned contest of this issue in its brief, arguing *only* the status of assistant foremen in the production division. On the basis of the entire record, it is found that *Adams, Ford* and *Sawyer* are employees eligible to vote and they are included in the unit. *UTD Corporation*, 165 NLRB No. 48; *The Singer Company*, 170 NLRB No. 165.

Alonzo Massey and *George Morris* are classified as assistant foremen in the assembly and packaging area. In addition, they also are known as "floor boys." They are under the immediate supervision of Benjamin Steinberg, foreman. Besides Massey and Morris, there are six to eight women working in this department. Their primary function is to keep the women supplied with work, to inspect the products and to refer any defective materials to Steinberg. The record indicates that Steinberg is continually in the area and repeatedly checks the work of Massey and Mor-

ris as well as the work of the women in this department. In addition to the above tasks, Massey and Morris spend time on various jobs such as the buffing and cutting wood. Massey and Morris are hourly rated, punch a time clock and, except for receiving a rate higher than the other employees in their department, share the same benefits and working conditions. They have no authority to hire, fire, suspend, promote, transfer or discipline employees, nor do they responsibly direct any employee or otherwise engage in conduct which would affect the employment status of any employee in their department. The fact that they attend bi-weekly meetings classified in the record as "supervisory meetings" or "management meetings," which are attended by the assistant to the president, the assistant plant manager, the foreman in this department, another foreman and other assistant foremen, is not sufficient grounds to find that Morris or Massey possess the statutory indicia of a supervisor. The primary function of these meetings appears to provide for the regulation of and to discuss production problems although there was evidence that the disciplining of employees was also taken up. It is found that both *Alonzo Massey* and *George Morris* are employees eligible to vote and they are included in the unit. *UTD Corporation, supra; The Singer Company, supra.*

The remaining employees in dispute are *Ivory Scott* and *Raymond Zagrafos.* Both are titled "assistant foremen" and report to Charles Kabilian, foreman. *Scott* is hourly rated, punches a time clock and works in the electro-plating department with three other men. He performs certain set-up operations of a routine nature and keeps certain production records. The Employer provided Scott with night school training in electro-plating, which training makes him more experienced in this operation than any one else in his department. Scott communicates with Kabilian as to the progress of work in the department and receives

certain assignments and instructions from him. Scott testified that he did not have the authority to hire, fire, suspend, layoff, recall, promote, discipline or otherwise engage in any course of conduct that would affect the employment status of any employee in his department. In this respect, the Employer's assistant to the president testified that Scott possessed such attributes and referred to an incident wherein the Employer conteds that Scott warned an employee that he would be discharged. Like Morris and Massey, Scott has participated in the so-called "supervisory" or "Management meetings." Assuming, *arguendo,* that Scott warned the employee concerning discharge, it is found that this incident is too isolated to predicate a finding of supervisory status. Accordingly, on the basis of the record as a whole, it is found that Scott does not possess the indicia of a supervisor and he is found to be an employee eligible to vote and included in the unit. *UTD Corporation, supra; The Singer Company, supra.*

Zagrafos is under the direction of Kabilian and works in the buffing department. In addition, there are seven men and two women employed in this department. Zagrafos is hourly paid, punches a time clock and receives an hourly rate higher than the other individuals in his department but otherwise enjoys similar benefits and working conditions. Zagrafos testified that he spends eighty per cent of his time "supervising" the work of the other nine individuals, ten per cent performing production work and the remaining ten per cent in obtaining stock. He also testified that he has recommended three individuals for wage increases and that, in fact, they did receive the increases. Additionally, Zagrafos testified that he has on one occasion fired an employee and has excused employees from working on other occasions. The record indicates that, while Zagrafos may receive general instruction from Kabilian as to work in his department, he makes specific determinations as to

what employees shall perform the work and in what order. Zagrafos also attends the so-called "management and/or supervisory meetings." On the basis of the record as a whole, it is found that Zagrafos has the authority to discharge employees, to effectively recommend wage increases and to responsibly direct the employees in his department. Accordingly, it is found that *Zagrafos* is a supervisor within the meaning of the Act and he is excluded from the unit. *Research Craftmeg Corporation*, 129 NLRB 723, 725, 726.

Accordingly, the undersigned finds that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees of the Employer at its Hyde Park, Massachusetts, plant, including the records keeping department employees, shipping and receiving employees, and the truck driver, but excluding office clerical employees, professional employees, guards and supervisors[2] as defined in the Act.

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[2] Based upon the record and the stipulation of the parties, the following-named individuals are found to be supervisors and, accordingly, are excluded from the unit: *Frederick Loder*, plant manager; *Kenneth Sullo*, plant manager and quality control engineer; *Cliff Thornton*, industrial engineer; *Andrew Scott*, die casting engineer; *Abe Bunshoff*, plant and maintenance engineer; *William Flynn*, assistant plant manager; *Chester Williams*, assistant plant manager; *G. Garner*, quality control manager; *Frank Jackson*, quality control manager; *Carl Larson*, production and planning manager; *Malcolm Emack*, general foreman, die casting; *Herbert Davis*, *Darnel Johnson* and *Adam Smith*, shift foreman, die casting department; *Raymond Nichols*, day foreman, trim department, *Stanley Rejunas*, afternoon foreman, trim department; *Anthony Gangemi*, foreman, toolroom; *Don Beech*, foreman, general maintenance department; *Charles Jordan*, foreman, die casting maintenance; *Charles Kabilian* and *Bernard Steinberg*, foremen, products department; *Paul LaFond*, *John Smolinski* and *Mel Fontez*, shift foremen, M-525 department; and *Eugene Lyons*, foreman, shipping and receiving department.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[3] Those eligible shall vote whether or not they desire to be rep-

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[3] An election eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, John F. Kennedy Federal Building, Boston, Massachusetts 02203, on or before May 29, 1968. Accordingly, please furnish two copies of the list. Under Board directives, no extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

resented for collective bargaining purposes by the United Steelworkers of America, AFL-CIO.

ALBERT J. HOBAN
Regional Director, Region One

Dated May 22, 1968
at Boston, Massachusetts

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

Case No. 1-RC-9973

In the Matter of

MAGNESIUM CASTING CO.
Employer,
AND
UNITED STEELWORKERS OF AMERICA
AFL-CIO
Petitioner.

MOTION TO WITHDRAW DECISION AND DIRECTION OF ELECTION AND DISMISS PETITION

Comes now Counsel for Employer, Magnesium Casting Co., and hereby moves that the Decision and Direction of Election in the above-numbered case, issued by Albert J. Hoban, Regional Director, Region One, on May 22, 1968 be withdrawn and the Petition in said case be dismissed for the following reasons:

1. The requirement that the Employer furnish an election eligibility list, containing the names and addresses of all the eligible voters, to be made available to all parties to the election, said requirement originally being set forth in *Excelsior Underwear, Inc.* 156 *NLRB* 1236, was improperly promulgated. According to the United States Court of Appeals for the First Circuit in its *Wyman Gordon* decision, the procedure utilized in implementing the *Excelsior* rule was contrary to the requirements of the Administrative Procedures Act.

2. Absent a valid rule properly instituted, the Regional Director's order requiring the Employer to furnish

the list of names and addresses of eligible voters rendered aid and assistance to the Petitioner, United Steelworkers of America, AFL-CIO, which aid and assistance by its very nature results in conduct which necessarily affects the results of the election.

3. The Employer complied with the rule under the assumption that it was valid and under the threat of the election being set aside absent compliance.

CONCLUSION

In view of the above conduct by the Regional Director, the Employer respectfully urges that the Decision and Direction of Election be withdrawn and the Petition be dismissed. It is only by this means can the effect of the Regional Director's action be rectified.

Respectfully submitted,
MAGNESIUM CASTING CO.
By its attorneys
STONEMAN AND CHANDLER
JEROME H. SOMERS

Dated at Boston, Massachusetts
June 17, 1968
Post Office Address:
79 Milk Street
Boston, Massachusetts 02109

APPENDIX E

RAAUIJHZ RUEVDAOO15 1711616-UUUU—RUEVDAC.
NLRB

JUNE 19 [ILLEGIBLE]

FM ALBERT J. HOBAN DIR NATL LABOR
RELATIONS BRD BOSTON MASS.
TO STONEMAN & CHANDLER ATTN JEROME H.
SOMERS 79 MILK ST. BOSTON MASS.
BT
RE MAGNESIUM CASTING IRC-9973. YOUR MOTION
TO WITHDRAW DECISION AND DIRECTION OF
ELECTION AND DISMISS PETITION IS HEREBY
DENIED. REGIONAL DECISION AND DIRECTION
OF ELECTION ISSUED 5-22. WYMAN GORDON
DECISION OF FIRST CIRCUIT DOES NOT PROVIDE
FOR RETROACTIVE APPLICATION.
BT

APPENDIX F

[WESTERN UNION — TELEGRAM]

3:45 PM. EDT
June 19, 1968.

HOWARD W. KLEEV
DEPUTY EXEC. SECY NATIONAL LABOR
RELATIONS BOARD WASH. DC.
COUNSEL FOR EMPLOYER MAGNESIUM CASTING
CO. IN CASE NUMBER 1-RC-9973
REQUEST SPECIAL PERMISSION TO APPEAL
REGIONAL DIRECTORS DISMISSAL OF
EMPLOYERS MOTION TO WITHDRAW DECISION
AND DIRECTION OF ELECTION AND DISMISS
PETITION ON GROUND THAT WYMAN-GORDON
DECISION OF FIRST CIRCUIT COURT OF APPEAL
DATED JUNE 12 1968, DOES NOT PROVIDE FOR
RETROACTIVE APPLICATION EMPLOYER URGES
THAT SINCE AS THE CIRCUIT COURTS FOUND,
THE EXCELS OR WHO WAS IMPROPERLY
PROMULGATED UNDER THE ADMINISTRATIVE
PROCEDURE ACT, IT WAS ILLEGALLY ENFORCED
AB INITIO AND THEREFORE THE CIRCUITS
DECISION MUST HAVE RETROACTIVE
APPLICATION. THE REGIONAL DIRECTORS ORDER
REQUIRING THE EXCELSIOR LIST RENDERS
AID AND ASSISTANCE TO PETITIONER WHICH
NECESSARILY AFFECT THE RESULT OF THE
ELECTION. THE EMPLOYER ORIGINALLY
COMPLIED WITH RULE UNDER ASSUMPTION IT
WAS VALID AND UNDER THE THREAT OF
ELECTION BEING SET ASIDE ABSENT
COMPLIANCE.
EMPLOYER URGES DECISION AND DIRECTION OR
ELECTION BE WITHDRAWN AND PETITION BE

DISMISSED AS ONLY MEANS TO RECTIFY REGIONAL DIRECTORS ACTION. ELECTION IS SCHEDULED ON FRIDAY JUNE 19 AT 630AM SERVICE OF THIS APPEAL MADE ON OTHER PARTIES

STONEMAN AND CHANDLER

BY JEROME H SOMERS

APPENDIX G

C 25102 EVDAC

JUN 21 7:01 AM '68
C.S.A P.B. S. TELETYPE

223632 C 13013 MSCEVO6 50 15
RAAUIJHZ RUEVDEL 0015 1722150-UUUU-RUEVDAC.
FM ROBERT VOLGER ASSO EXEC SECY WASH DC
NLRB
TO RUEVDAC/3[STONEMAN & CHANDLER ATT:
JEROME H. SOMERS 79 MILK ST. BOSTON MASS.
BT
RE: MAGNESIUM CASTING CO., 1-RC-9973. IT IS HEREBY ORDERED THAT EMPLOYER'S REQUEST FOR SPECIAL PERMISSION TO APPEAL REGIONAL DIRECTOR'S DENIAL OF MOTION TO WITHDRAW DECISION AND DIRECTION OF ELECTION AND TO DISMISS PETITION BE, AND IT HEREBY IS DENIED AS LACKING IN MERIT. BY DIRECTION OF THE BOARD:
BT

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 819

MAGNESIUM CASTING COMPANY, PETITIONER

v.

ALBERT J. HOBAN, REGIONAL DIRECTOR OF THE FIRST REGION OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 11–14) is reported at 401 F. 2d 516. The opinion of the district court (Pet. 15–18) is unreported. The underlying Decision and Direction of Election of the Regional Director of the National Labor Relations Board (Pet. 19–27) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1968 (Pet. 11, 14). The petition for a writ of certiorari was filed on December 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

329-985—69

QUESTION PRESENTED

Whether the employer waived his right to challenge the validity of the Board's *Excelsior* rule (156 NLRB 1236), which requires an employer to furnish the names and addresses of its employees eligible to vote in a Board election, when it supplied the required list to the Board, without objection, upon demand.

STATUTES INVOLVED

Section 9(c) of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 159(c)), in relevant part, reads as follows:

> (1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists

shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT

On March 14, 1968, the United Steelworkers of America, AFL–CIO, filed a petition with the Board for an election among the production and maintenance employees of the Magnesium Casting Company's Boston, Massachusetts, plant. On May 22, the National Labor Relations Board's Regional Director issued a decision (Pet. 19–27) directing that an election be held (the date was later fixed at June 21) and requiring the Company to file a list containing the names and addresses of all eligible voters with the Regional Director within seven days, which list would then be made available to all parties to the election; he stated that a failure to comply with this requirement would be grounds for setting aside the election if a proper objection were filed (Pet. 26, n.3). This requirement was imposed in accordance with the Board's decision in *Excelsior Underwear Inc.*, 156 NLRB 1236. On May 29, the Company supplied the *Excelsior* list without objection (Pet. 12).

On June 12, 1968, the United States Court of Appeals for the First Circuit announced its decision in *Wyman-Gordon Co.* v. *National Labor Relations*

Board, 397 F. 2d 394, certiorari granted, November 12, 1968, No. 463, this Term, holding that the *Excelsior* rule was invalidly promulgated. On June 17, the Company filed a Motion to Withdraw Decision and Direction of Election and Dismiss Petition, on the ground that the Company had been compelled to furnish the Union with assistance which *Wyman-Gordon* had established could not legally be required (Pet. 28–29). On June 19, the Regional Director denied the motion; the Board thereafter denied the Company's request for special permission to appeal (Pet. 30, 33). The election was held as scheduled and the Union won, 140 to 59, with 1 challenged ballot (Pet. 16).

On July 12, the Company brought an action in the United States District Court for the District of Massachusetts to enjoin the Regional Director and the Board from certifying the results of the election. The Board moved to dismiss the complaint on the grounds that the district court lacked jurisdiction over the subject matter of the action and that the Company had failed to exhaust its administrative remedies. The court found that the Board had exceeded its statutory authority in requiring the Company to furnish the *Excelsior* list and enjoined it from certifying the results of the election pending final disposition by this Court of the petition for certiorari which the Board had meanwhile filed in *Wyman-Gordon* (Pet. App. 15–18).

On appeal by the Board, the court of appeals summarily reversed. The court of appeals held (Pet. 13):

"There is no merit in the contention that the election was unlawful. The fact that the Board improperly ordered [the Company] to supply certain factual information was not jurisdictional so far as the election itself was concerned, but merely collateral thereto." Accordingly, it concluded (*ibid.*) that here, as in *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, the Company had waived its objection by failing to assert it in timely fashion.

ARGUMENT

As shown in the Statement, the Company voluntarily complied with the *Excelsior* requirement and then, when the First Circuit ruled in *Wyman-Gordon* that the *Excelsior* requirement was invalidly promulgated, sought to take advantage of that ruling by claiming that the information it previously furnished without question had tainted the subsequent election. But, as the court below properly concluded, "[The Company] could not use its own compliance, afterwards regretted, as a basis for stopping all proceedings" (Pet. 13). Under well settled principles, an objection not timely pressed before the administrative agency may not be raised belatedly before the courts. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37–38; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492. As the court below noted (Pet. 12), the Company's "recourse, if the *Excelsior* rule was invalid, was to refuse to comply and to allow the election to proceed in an otherwise orderly fashion if the Board and the union were so minded."

Then, if the Union won the election, the Company's bargaining obligation could still be fixed; and, if the Union lost the election, the Board could set it aside and institute judicial proceedings to secure the list, in which the Company's arguments against the *Excelsior* rule could have been raised.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board.

JANUARY 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969